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and The Solaray Corporation*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SUNEARTH, INC., et al.,

Plaintiffs,

vs.

SUN EARTH SOLAR POWER CO., LTD.,
et al.,

Defendants.

Case No. CV -11-4991 CW

**DIRECT EXAMINATION TRIAL
DECLARATION OF RICHARD REED**

Richard Reed, upon his oath and subject to the penalties of perjury, declares as follows:

1. This Declaration is of my own personal knowledge. I am an adult individual residing in Honolulu, Hawaii. I am not under any disability, and I am competent to make this Declaration.
2. This Declaration is intended to supplement all other declarations submitted in the above captioned action, and I have endeavored to avoid unnecessary repetition of the matters provided in relation to any of those declarations.

1 3. I am currently the President of SunEarth, Inc. (“SunEarth”), and The Solaray
2 Corporation (“SOLARAY”), and have served in those capacities since 1987 and 1992,
3 respectively. I have served as either a current or former officer or director of the California
4 Solar Energy Industries Association (CALSEIA), the Solar Energy Industries Association
5 (SEIA), the Solar Rating and Certification Corporation (SRCC), the Hawaii Solar Energy
6 Association (HSEA), and the Hawaii Renewable Energy Alliance (HREA).

7 4. The Solaray Corporation does business as “Inter-Island Solar Supply” and is one of the
8 nation's largest distributors of renewable energy products, including solar thermal collectors and
9 photovoltaic systems. Solaray owns and publishes a website at solarsupply.com where it
10 promotes its services and the products it sells. For example, and directly relevant for purposes
11 of this current dispute, in fiscal 2012 (Oct. 2011 - Sept. 2012), Solaray sold several tens of
12 millions of dollars of photovoltaic panels manufactured and branded by other companies such as
13 SolarWorld, Kyocera Solar, Inc. and Hyundai.

14 5. While serving as Solaray’s President for the past 25 years, I have been personally
15 involved in the marketing and selling of photovoltaic systems and have acquired a deep and
16 extensive knowledge of how they work and how those products are marketed and regulated. In
17 addition, in my capacity as a director and officer of the solar energy industry trade groups listed
18 above, I have for many years routinely interacted with the owners and managers of the
19 companies that make and sell photovoltaic systems. I also routinely interact and work with
20 government agencies in the United States that regulate and promote the use of photovoltaic
21 systems. Within the past 20 years I have also attended and participated in about 35 solar energy
22 tradeshow during which I routinely interacted with sales representatives of the companies that
23 sell photovoltaic systems and, as a result, I have first-hand knowledge of how those products are
24 marketed and to whom they are marketed.

25 6. SunEarth, Inc. does business as “SunEarth” and manufactures and sells solar thermal
26 collectors that use solar energy to heat and store hot water. SunEarth also sells and offers
27 related products and services. SunEarth owns and publishes a website at sunearthinc.com where
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1 it promotes its services and the products it sells. One of those related products sold since 2003
2 is a rail mounting system (a “strut”) used to mount not only solar collectors but also
3 photovoltaic panels. That product is advertised by SunEarth at
4 <http://www.sunearthinc.com/components/solar-strut>. SunEarth sells its products to distributors,
5 contractors, and builders and reaches those customers primarily through internet marketing,
6 solar industry trade shows, and trade magazines.

7 7. SunEarth, Inc. has in the past on a few occasions sold photovoltaic (“PV”) systems and
8 components, not under the SunEarth trademark, but at all times using the SunEarth, Inc. trade
9 name.

10 8. While serving as SunEarth’s President for the past 20 years, I have been personally
11 involved in selling solar thermal collectors and have acquired a deep and extensive knowledge
12 of how they are made, how they work and how those products are marketed and regulated.
13 Through my leadership activities and work with the solar energy industry trade groups, my
14 interactions with government regulatory agencies and my presence and participation in solar
15 energy tradeshow, I have a first-hand knowledge of how those products are marketed and to
16 whom they are marketed.

17 9. For approximately its first 25 years, the core products regularly sold by “the solar power
18 industry” were the various brands of solar thermal collectors used to heat and store hot water.
19 Solaray/IISS has actively sold PV modules, inverters, and related products since 1983. The PV
20 industry at that time was nascent, but IISS saw an immediate opportunity in the “off-grid” solar
21 market, i.e., users of PV-generated electricity for their own use, and not utility companies
22 generating electricity for sale on the grid. Sales of PV systems in the United States was marginal
23 until around 2000 when state legislatures in the Western United States enacted laws permitting
24 energy consumers to sell their unused energy back to their utility companies. These “net energy
25 metering” laws were enacted in response to the Western United States energy crisis in 2000 and
26 were designed to promote the widespread use of photovoltaic systems. When the sales of
27 photovoltaic systems began to increase they did so from within the already-mature solar power
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1 industry and marketplace. Today, sales of PV systems are far greater than sales of solar thermal
2 systems, but solar water heating continues to play an integral role in the solar energy industry,
3 particularly in those areas that have electric or propane water heating.

4 10. Those who purchase these two types of solar power products (such as wholesalers,
5 contractors and builders) routinely inform themselves about those products through the same
6 solar power industry resources. Those resources are tradeshow, trade journals and trade
7 organizations. For example, The Solar Electric Power Association is a solar power trade
8 organization that educates utility companies on the benefits of using solar power and promotes
9 the sale of both solar thermal collectors and photovoltaic systems. The Solar Electric Power
10 Association publishes its website at solarelectricpower.org.

11 11. Within the last few years the solar power industry has expanded to include “solar
12 cogeneration technology.” The products that use this technology combine solar thermal
13 collectors and photovoltaic panels into one product that generates both electricity and heat for
14 heating water. Sunearth was involved in developing a hybrid photovoltaic thermal array called
15 “Phototherm” that combined the two technologies into a single product. In addition, the May
16 2012 edition of the Arizona Governor’s Office of Energy Policy “Energy Policy Update”
17 newsletter describes a solar cogeneration system that is currently being installed at the Tucson
18 Medical Center. A true and correct copy of the relevant portions of that newsletter is attached
19 as Trial Exhibit 211. The solar cogeneration system described is made by Cogenra Solar and
20 will produce both electricity and hot water for the medical center’s campus power plant via one
21 integrated system with both photovoltaic panels and solar thermal collectors. An article in the
22 online September 11, 2012 edition of PV Today also discusses these “solar cogeneration
23 technology” products and the customers who buy them. A true and correct copy of that article
24 is attached as Trial Exhibit 210 and the original is located at [http://news.pv-](http://news.pv-insider.com/concentrated-pv/new-market-micro-scale-solar-cogeneration)
25 [insider.com/concentrated-pv/new-market-micro-scale-solar-cogeneration](http://news.pv-insider.com/concentrated-pv/new-market-micro-scale-solar-cogeneration). I have first-hand
26 knowledge of these hybrid solar power products because of work with Solaray and SunEarth
27 and because, in 2008, I helped found EchoFirst (formerly known as PVT Solar, Inc.), a
28 California corporation organized for the purpose of manufacturing and selling products that

1 make use of solar cogeneration technology. The EchoFirst product is very disruptive to the PV
2 only model, because it reunites the high value, lower cost thermal option at a small marginal
3 cost.

4 12. Solar thermal collectors and photovoltaic panels complement each other in another way
5 as well. Some solar thermal systems use a photovoltaic panel to generate electricity to power
6 the solar thermal system components or pumps. SunEarth, for example, sells a solar collector
7 system with a pump that can be powered by either an existing electric AC source or a
8 photovoltaic panel. That product is the SunEarth SolaRay Series Closed-Loop System and is
9 advertised by SunEarth at <http://sunearthinc.com/systems/solaray>.

10 13. Based on my experience in the solar power industry I have learned that homeowners and
11 commercial building owners who want to use solar power to lower or eliminate their energy
12 bills invariably have limited roof space and limited budgets. Those potential consumers of solar
13 power products have the choice of buying a solar thermal system, a photovoltaic system, or a
14 hybrid of the two systems. For end users who only wish to use solar energy to heat water, the
15 superior efficiency of solar thermal systems makes it extremely unlikely for a builder or
16 contractor to recommend a PV system for that application. Similarly, if an end user only spends
17 a small amount to heat water, a builder or contractor usually would not recommend a solar
18 thermal system for that application. If, however, an end user expends substantial energy heating
19 water for various applications, AND wishes to reduce or eliminate utility costs for other energy
20 uses, the most efficient way to lower or eliminate those utility bills is to use an integrated solar
21 thermal/photovoltaic hybrid system. In my experience, the substantial majority of end users fit
22 this last description. Despite the greater efficiency of solar thermal systems, some contractors
23 may (and do) choose to exclusively use PV for all applications.

24 14. Companies that sell solar thermal collectors, like SunEarth and its distributors, and the
25 companies that sell PV systems, market their products primarily to the same end users:
26 homeowners and commercial building owners. Because both solar thermal systems and the
27 electricity generated from PV systems can be used to heat water, solar thermal systems and PV
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1 panels directly compete for roof space and budget resources of these end users. For customers
2 who do end up buying a solar power product to lower their energy bills, the solar thermal
3 system sale that is not made may result in a sale of a photovoltaic system, and vice versa. These
4 two systems, in addition to being complementary to each other, are at least in part in direct
5 competition, because they are alternatives to each other.

6 15. Many factors go into a contractor's or end user's decision to use a solar thermal system,
7 a photovoltaic system, or some combination of the two—including the lifespan, quality,
8 reliability, and trustworthiness of the installed products. Similar factors are involved in a
9 contractor's or end user's preference for the **source** of the technology (PV or solar thermal
10 products) or source of the product to be installed. One of the benefits of selling "SunEarth"
11 products is that our sales team does not typically need to spend any time convincing customers
12 or potential customers that our products are high quality, reliable products. The vast majority of
13 our communications with customers is based around costs – if we can compete on cost, the
14 goodwill SunEarth has established in the market typically results in the completion of the sale.

15 16. Because of the substantial goodwill developed in the "SunEarth" trade name and
16 trademark in the solar power industry, SunEarth, Inc. and The Solaray Corporation have for
17 several years considered selling photovoltaic panels private labeled using the "SunEarth" trade
18 name and trademark. Unless precluded by the outcome of this litigation, SunEarth, Inc. and The
19 Solaray Corporation will very likely within the next few years, begin to market and sell
20 photovoltaic systems and components manufactured by third parties and private labeled using
21 the "SunEarth" name and mark.

22 17. SunEarth manufactures a number of different solar thermal systems that are all sold
23 under the "SunEarth" trade name and trademarks. Because some components of SunEarth's
24 solar thermal systems are actually made by other companies, I am knowledgeable about the
25 practice of "private labeling" of products. For example, some of the water storage tanks used in
26 SunEarth's solar thermal systems are actually made by Rheem Manufacturing Company. While
27 those water storage tanks are actually designed and made by Rheem, consumers are unaware of
28

1 that fact because the tanks are labeled with SunEarth's trade name and marks. These Rheem
2 water storage tanks are "private label" products because they are unbranded by Rheem when
3 made but are subsequently labeled and re-sold by SunEarth as SunEarth-branded products—
4 either alone or as part of a SunEarth solar thermal system. Based on my experience "private
5 labeling" of products is common in the solar power industry and in other industries as well.

6 18. Private labeling is a term referring to the practice of a company other than the
7 manufacturer of a product as the source of and party responsible for that product. SunEarth, Inc.
8 and The Solaray Corporation have both sold products under a private label at various times. For
9 example, SunEarth, Inc. currently sells storage tanks manufactured by Rheem as part of the
10 SunEarth SunSiphon system, labeled entirely under the "SunEarth" name and mark.

11 19. In the solar power marketplace the "manufacturer" of a product is typically referring to
12 the company that publicly takes responsibility for that product and how it performs rather than
13 the company that actually makes the product. For example, SunEarth is considered the
14 "manufacturer" of the water storage tanks that are actually made by Rheem but which are sold
15 as SunEarth-branded products. Rheem is not labeled or marketed or otherwise noted as the
16 "manufacturer" of those tanks because they are private label products sold by SunEarth as its
17 products.

18 20. I am unaware of any legal requirement that a product bear a label identifying the
19 corporate name of the actual manufacturer of that product and I am aware of many, many
20 products sold in the United States that do not list the corporate name of the actual manufacturer
21 of the product on the product's label. Examples that are familiar to many people are products
22 manufactured by companies in China and sold under the "Apple" name and mark in the United
23 States. Such products are typically labeled as being "Designed by Apple in California
24 Assembled in China". Everyone is familiar with seeing the "made in China" label, but it is
25 extremely uncommon to see the actual name of the company in China that manufactured the
26 product.
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21. Mr. Dong's declaration filed August 23, 2012 [Dkt No. 124-1] references California's listing of eligible solar products for solar incentive programs (See paragraphs 47-48). The procedure for a photovoltaic module to be listed as eligible for incentives in California is found at http://www.gosolarcalifornia.org/equipment/documents/PV_Eligibility_Procedure.pdf. Eligible products must be certified by a Nationally Recognized Testing Laboratory (NRTL). CSA, Intertek, TUV Rheinland PTL, and UL are the NRTLs who can currently perform this certification. The procedures specifically allow for private labeling of PV modules as follows:

"Private labeling of PV modules: Some businesses wish to private label PV modules for another manufacturer. Such products will be accepted as eligible should the application form be submitted with a multiple listing letter from the listing agency (the NRTL). The multiple listing process is how the listing agency certifies private-labeled products. The multiple listing letter is evidence of certification of the product to ANSI/UL 1703. If the comparable module from the original equipment manufacturer (OEM) is already eligible, no re-testing of the performance parameters or submittal of a performance parameter test report is required for private labeled modules."

22. Some of SunEarth's solar thermal products have been evaluated and certified by Underwriters Laboratory ("UL"). A true and correct copy of one of SunEarth's UL certifications is attached as Trial Exhibit 212. Underwriters Laboratory has a "Multiple Listing" certification process in place whereby a company such as SunEarth that sells a private labeled product can seek certification under the name of the company that sells the branded-product rather than the name of the company that actually makes the product. UL describes its private labeling service in the letter attached hereto as Trial Exhibit 89, and online at <http://www.ul.com/global/eng/pages/offerings/services/programs/multiplelisting/> as follows:

PRIVATE LABELING AND UL'S MULTIPLE LISTING SERVICE

The concept of private labeling isn't a new one, but its appeal is stronger today than ever. UL's Multiple Listing Service makes it possible for a company to market its products to a wider audience and for private labelers to enjoy the advantages of UL certification for both the United States and Canada.

The Multiple Listing Service is used when products certified by UL to U.S. and/or Canadian requirements for one company are produced for marketing under the name of another company -- the multiple listee. Manufacturers and their private label distributors are then authorized to use the appropriate UL Mark for the United States or Canada.

Advantages of Multiple Listing Service

UL's Multiple Listing Service offers an easy, convenient way to provide customers a full line of products carrying your brand name, leveraging the UL Mark of safety earned by your suppliers. UL Multiple Listing private labeling services deliver:

- Inclusion of your private label name in UL's [Online Certifications Directory](#) and hard-copy directories of certified products for a competitive advantage over non-certified products and visibility to those specifying and buying UL certified products.
- Unquestioned product acceptance by regulatory authorities who are more familiar and more readily trust the UL Mark over other third-party certification marks.
- Superior marketability to safety-conscious retailers and others in your supply chain that understand the value of the UL Mark in signaling their commitment to safety.
- Recognition by U.S. consumers that the product has met safety requirements. Consumers who look to the UL Mark as their primary symbol of a product's safety and quality.

Multiple Listing forms

- The multiple listee and applicant authorize their Multiple Listing relationship by signing a form (the L14A) together.
- The multiple listee and applicant may choose the level of authorization of the form either blanket authorization of all files or specified files only.
- The multiple listee and applicant use the form to designate one company (the multiple listee, the applicant or an agent) as the Multiple Listing manager. This company will be responsible for handling requests to and corresponding with the Multiple Listing group.
- Once the Multiple Listing relationship is established, the Multiple Listing manager will use a simplified request form to submit work to the Multiple Listing group. No signatures are required.

23. The process to sell a product manufactured by one company under the name and mark of a different company is not complicated, and has been specifically facilitated by testing laboratories such as UL and government certification processes such as California's. While SunEarth has no need to use this "Multiple Listing" certification process for its Rheem-made water storage tanks, I have looked into this process to evaluate how to go about selling photovoltaic systems made by other companies but sold by Solaray or SunEarth as SunEarth-branded products. I know of no reason why the photovoltaic systems actually made by Defendant Sun Earth Solar Power Company cannot become UL-certified and marketed in the United States under the name of another company, such as Defendant NBSolar USA.

24. I declare, verify and certify, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge.

1
2 Further Declarant sayeth naught.

3
4 /s/ Richard Reed

5 Richard Reed

6
7 Executed in Kauai, Hawaii

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9 Date: October 4, 2012

CERTIFICATE OF SERVICE

Pursuant to Civil L.R. 5-5 and 5-6, I certify that on October 4, 2012, I caused service of the following document: **DIRECT EXAMINATION TRIAL DECLARATION OF RICHARD REED** to be made by electrical filing with the Clerk of the Court using the CM ECF System, which will send a Notice of Electronic Filing to all counsel of record who have filed a Notice of Consent of to Electronic Service in this action.

COPIES of the foregoing were emailed this 4th day of October, 2012 to:

James J. Foster, Esq.
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600 Atlantic Avenue
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jfoster@wolfgreenfield.com

/s/ Traci Lopez

ATTESTATION PURSUANT TO GENERAL ORDER NO. 45

Pursuant to General Order No. 45 of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

/s/ Stephen B. Mosier
Stephen B. Mosier